2007

Nathan H. Merrill v. Vermax of Florida, Inc. dba Dakota Cabinets and/or Wausau Business Ins., and the Utah Labor Commission : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

NATHAN H. MERRILL, Petitioner/Appellant, vs. VERMAX OF FLORIDA, INC. DBA DAKOTA CABINETS and/or WAUSAU BUSINESS INS., and the UTAH LABOR COMMISSION, Respondents/Appellees.	:	Case No.. 20070584-SC 20060693-CA Labor Commission Nos.: 2003280 and 2003281

BRIEF OF APPELLEES

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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this matter pursuant to §63-46b-16, Utah Code Annotated and Rule 45 Utah Rules of Appellate Procedure.

CONSTITUTIONAL PROVISIONS

Utah State Constitution, Article I, Section 24:

"All Laws of a general nature shall have uniform operation."

14th Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STANDARD OF REVIEW

Mr. Merrill asserts that the coordination of benefits clause of the Workers' Compensation Act, § 34A-2-413(5), violates Section 1 of the Fourteenth Amendment of the United States Constitution and Art. I, Section 24 of the Utah State Constitution. Questions relating to the constitutionality of a statute are questions of law reviewed under a correction of error standard. Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988). However, statutes are presumed constitutional, and the court will "resolve any reasonable

doubts in favor of constitutionality." Ryan v. Gold Cross Services, Inc., 903 P.2d 423, 424 (Utah 1995).

SUMMARY OF ARGUMENT

Workers' compensation, social security disability and retirement, and unemployment compensation benefit systems are all intended to provide income replacement to those who have suffered wage loss due to physical disability, economic unemployment or old age.

Utah's workers' compensation system was created to provide statutory benefits to employees who have been injured at work. Fault is not a factor in workers' compensation, but the statute is liberally construed to provide broad coverage. However, in exchange for such broad coverage, the benefits available are limited only to the benefits provided by statute.

Section 413(5) is one such limitation, it provides an offset of workers' compensation permanent total disability compensation based on one-half of the social security retirement benefit received by the employee. Mr. Merrill claims that this offset is unconstitutional and violates older workers' rights to equal protection of the laws. However, Mr. Merrill does not have a constitutional right to receive more than one wage replacement benefit. Mr. Merrill receives social security retirement benefits and workers' compensation permanent total disability benefits. The purpose of these two types of benefits is to replace wages that he is no longer able to earn due to age and disability.

The reverse offset in § 413(5) is intended to prevent the employer from paying twice for the same wage loss and prevent receipt of duplicate benefits by injured workers. Mr. Merrill's employers have paid one-half of the insurance premium for Mr. Merrill's social security retirement benefit, in addition, his last employer is paying workers' compensation benefits. The offset in §413(5) works to avoid duplicate payments from multiple sources for one wage loss. This helps to control the cost of workers' compensation premiums and prevents duplicate payments for a single wage loss. Because the coordination of benefits provision in §413(5) is rationally related to legitimate state purposes, the statute does not violate state or federal equal protection provisions.

ARGUMENT

Mr. Merrill asserts that Section 413(5) treats him differently from other permanently and totally disabled injured workers, those under age 65 who do not receive social security retirement benefits. Clearly, Section 413(5) treats permanently and totally disabled injured workers who qualify for social security retirement benefits differently from those who do no so qualify. However, for the reasons outlined below, §413(5) is rationally related to a legitimate state purpose and therefore, does not violate the equal protection provisions of Art. 1, § 24 of the Utah Constitution or the Fourteenth Amendment of the United States Constitution.

Age is not a suspect class subject to strict scrutiny under Utah's test of constitutionality. Purdy v. University of Utah, 584 P.2d 831 (Utah 1978) (Age is not an inherently suspect classification), and the Fourteenth Amendment of the United States Constitution). The federal courts have likewise held that age is not a suspect class. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). In Murgia the Court observed, that "older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'" Id. at 313. "Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." Id. at 313-314. Therefore, legislative acts which discriminate based upon age are reviewed under a rational basis test.

The test under federal law is whether the state action is rationally related to a legitimate state interest. "States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision. Rather, a state may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. That age proves to be an inadequate proxy in any individual case is irrelevant" Kimel et al. v. Florida Bd. of Regents, et al., 528 U.S.62, 83 (2000).

Workers' compensation is economic legislation to provide subsistence benefits to employees injured at work. See A. Larson & Lex K. Larson., LARSON'S WORKERS' COMPENSATION LAW §1.03 (2007). Receipt of workers' compensation benefits is not a fundamental right under federal law and rights related to these benefits are reviewed under a rational basis test. In re Tobin, 675 N.E. 2d 781, 784 (Mass. 1997). Utah courts, have similarly applied a rational basis test to economic legislative acts. Baker v. Matheson, 607 P.2d 233 (Utah 1979). Although the construction of the Utah Constitution is "not controlled by the federal courts' construction and application of the Equal Protection Clause," such case law "may be persuasive in applying Article 1, § 24." Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984). Article I, § 24 and the Fourteenth Amendment of the United States Constitution "embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984).

> Whether a statute meets equal protection standards depends in the first instance upon the objectives of the statute and whether the classifications established provide a reasonable basis for promoting those objectives. . . Art. I, § 24 protects against two types of discrimination. First, a law must apply equally to all persons within a class. (Citations omitted.) Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute. (Citations omitted.) If the relationship of the

> classification to the statutory objectives is unreasonable or fanciful, the discrimination is unreasonable.

Id. at 670.

The legislation at issue in this case is § 413(5) of Utah's Workers' Compensation Act. This section provides in relevant part:

> Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after an employee has received compensation from the employer or employer's insurance carrier for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security Retirement benefits received by the employee during the same period.

Utah Code, § 34A-2-413(5).

Whether § 413(5) of the Workers' Compensation Act is constitutional or not necessarily turns on whether the statutory classification which limits benefits available to a specific group of recipients, is rationally related to a legitimate purpose of the statute. The Utah Supreme Court has identified several basic purposes for Utah's Workers Compensation Act:

The Workers' Compensation Act ("WCA") "is meant to provide an alternative remedy to employees injured or killed in the course and scope of their employment. In the absence of the WCA, an injured employee's only remedy would be a civil action brought against the tortfeasor–an inherently uncertain

means of recovery. The WCA guarantees a minimum level of compensation in exchange for which the injured party is required to abide by its terms." Anderson v. United Parcel Service, 96 P.3d 903, 910 (Utah 2004).

> Our Compensation Act is a beneficent law, passed to protect employees and those dependent upon them; to indemnify certain persons because workmen cease to earn wages, and to provide workmen's dependents with something in substitution for what they lost by the workmen's death. The clear intention of the Legislature was 'to substitute a more humanitarian and economical system of compensation for injured workmen or their dependents in case of their death,' which the more humane and moral conception of our time requires. The Act affords, through administrative bodies, injured industrial workmen or their dependents simple, adequate and speedy means of securing compensation, to the end that "the cost of human wreckage may be taxed against the industry which employs it, which tax or burden is added to the price of the produce and is ultimately paid by the consumer. Thus the Legislature sought to promote the public welfare by relieving society of the support of unfortunate victims of industrial accidents, and to avoid the necessity of the employee's dependents becoming objects of public charity. . . The law is predicated on the police power inherent in every sovereignty–the power to legislate and to govern for the best interests of the state.

Park Utah Consolidated Mines Co. v. Industrial Comm'n, 84 Utah 481, 36 P.2d 979, 981 (1934) (Internal citations omitted).

> Workmen's compensation acts are not intended to fully compensate and employee for his loss of time and diminished earnings both past and future, nor to compensate him for the pain and suffering incident to the injury. The common law action is based on some wrongful act of commission or omission on the part of

> the employer, and the employee assumes all the risks of injury except such as arise out of the negligence of the employer, while under the workmen's compensation acts the employee assumes no risks whatever, and hence his compensation in case of injury is based upon some arbitrary statutory regulations. . . . Those regulations are found in the statutes and are intended to prevent injustice to the employer, the employee, and to the public which must ultimately bear a large share of the burdens which are incident to our industrial activities.

Broderick v. Industrial Comm'n, 63 Utah 210, 224 P. 876 (Utah 1924).

Thus, our Workers' Compensation Act provides more certain, but limited, benefits to employees than those available under tort law. The predictability created by our compensation system allows employers to pay a sum certain for the loss sustained by the employee[1]. Clearly, predictability, reproducibility and ease of administration were important legislative considerations in the statutory creation of benefits under the Act.

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[1] The Workers' Compensation Act provides easily reproducible methods for calculating wage loss benefits based on the maximum weekly rates specified for each type of compensation or wage loss benefit. For example, maximum weekly rates are based on a percentage of the "state average weekly wage," pursuant to Section 34A-2-410(3). All compensation benefits that may be awarded under the Act are tied to the wages an injured worker was earning "at the time of the injury." Utah Code Section 34A-2-410(1); Uintah Power & Light Co. v. Industrial Comm'n, 189 P. 875, 876 (Utah 1920). Temporary wage loss benefits are paid for periods the employee is unable to work until the date of medical stability or the statutory 312 week limit for these benefits is reached. See Booms v. Rapp Construction Co., 720 P.2d 1363, 1366 (Utah 1986). Permanent Partial Disability compensation is based on a percentage of bodily impairment multiplied by a period of 312 weeks. See Utah Code §34A-2-411.

The system provides an efficient mechanism for an injured worker to file a claim and receive benefits for wage loss, medical treatment and loss of earning capacity (permanent disability compensation) without the need to sue in tort and prove the employer was negligent. The employer is responsible for payment of benefits for injuries that occur at work even if the employee was grossly negligent and caused the accident and injury. This liability for injured workers is spread among the consumers of the goods and services provided. Because the Act is intended to provide compensation when workmen "cease to earn wages," the benefit structure under the Act is directly tied to the injured worker's weekly wage[2].

Utah's permanent total disability "PTD" statute pays up to 85% of the state average weekly wage for permanently disabled injured workers. PTD benefits are paid for life, even though an injured worker could reasonably be expected to retire from the workforce at some point. Section 413(5) provides that upon receipt of social security retirement benefits, workers' compensation benefits will be reduced by 50% of the injured worker's social security retirement benefit.

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[2] All compensation benefits in the act are based upon 66⅔ percent of the employee's average weekly wage up to a statutory maximum based on the state average weekly wage. Section 34A-2-409. The statutory maximums are different for each type of disability payment: temporary total and temporary partial disability may be as high as 100% of the state average weekly wage under Sections 34A-2-410(1)(a) and 34A-2-411(1). Permanent partial disability, however is limited to a maximum rate of 66⅔ of the state average weekly wage under Sections 34A-2-412(3). Permanent total disability compensation is limited to no more than 85% of the state average weekly wage under Section 34A-2-413(2)(a).

"Retirement" is defined as "1 a: an act of 1. retiring: the state of being retired. b: withdrawal from one's position or occupation or from active working life c: the age at which one normally retires." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/retirement. "The purpose of the federal old age benefits of the Social Security Act is to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor." Social Security Bd. V. Nierotko, 327 U.S. 358, 364 (1946).

Given that workers' compensation benefits under the statute are intended to provide limited replacement for the loss of earning capacity caused by an industrial injury, the reduction of such compensation upon retirement from the workforce makes sense. The employer does not continue to pay full wage replacement benefits to the injured worker after he has withdrawn from active working life. As financial planners regularly remind us, retirement from the workforce typically results in reduced income, particularly income received for work performed. § 413(5) therefore, reduces the workers' compensation component of the injured workers' income based on the assumption that other wage replacement income is available to the injured worker upon receipt of social security retirement benefits. See A. Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW § 157.01 (2007).

Although the legislature could have elected to take similar offsets against privately funded pensions and other sources of retirement income, the mere lack of an offset against other sources of non-age-based retirement income does not make the offset imposed irrational. Rather, the Connecticut Supreme Court observed that receipt of non-aged based pension benefits does not necessarily equate to retirement from the workforce. The Court noted, "[I]t was rational for the Legislature not to apply the offset to those benefits if its goal was to reduce payment of wage replacement benefits for retired workers." Rayhall v. Akim Co., Inc., 263 Conn. 328, 353 (2003). Utah's reduction of permanent total disability benefits is based on the portion of the Social Security premium paid by the employer, and therefore, reduces the monthly workers' compensation payment by that amount. The limitations of all benefits, including permanent total disability benefits, under Utah's Workers' Compensation Act serves to reduce the costs of insurance for Utah employers.

Connecticut, Washington and Kentucky courts have concluded that a workers' compensation offset of permanent total disability benefits based on a percentage of the social security retirement benefit satisfies the rational basis test. Rayhall v. Akim Company, Inc., 263 Conn. 328 (2003) (Reverse offset applied to recipients of Social Security retirement benefits based on presumption the worker is retired from the workforce is rationally related to legitimate state purpose of cost saving); Harris v. Labor & Industry, 843 P.2d 1056 (WA 1993)

(Reverse offset applied to Social Security retirement benefits rationally related to legitimate purpose of avoiding duplicate payments of wage loss benefits); Wynn v. Ibold, 969 S.W.2d 695 (KY 1998) ("Tier down" provision that requires 10% reduction of permanent total benefits each year from age 65 to age 70 is rationally related to the legitimate state purposes of avoiding duplication of income benefits and reducing the overall cost of maintaining the workers' compensation system.) The Kentucky Supreme Court subsequently concluded that the Freedom to Work Act of 2000 did not change the constitutional analysis articulated in Wynn. McDowell v. Jackson Energy RECC, 84 S.W.3d 71 (KY 2002) (Freedom to Work Act does not create a right for social security retirement recipient to receive unearned income such as workers' compensation total disability benefits).

Mr. Merrill cites several cases to stand for the proposition that there is no duplication of benefits when a disabled worker is receiving Social Security retirement benefits and permanent total disability benefits because the two benefits do not serve the same purpose. However, the usefulness of the cases he cites are limited to their specific facts. Pierce v. LaFourche Parish Council, 762 So.2d 608 (LA 2000) addresses a benefit limitation different than the reverse offset contained in Utah's §413(5). The statute at issue in Pierce established a maximum supplemental disability benefit period of 104 weeks for workers over age 62. Injured workers under age 62 were entitled to a maximum of 520 weeks

of the same type of benefit. The Court concluded that this scheme was different from a true coordination of benefit arrangement. The Court noted, "The issue of whether it is constitutional under an equal protection analysis to reduce workers' compensation benefits under La. R.S. 23:1225(C)(1)(b) if the employee is also receiving social security old age benefits is not before us in this case." Id. at fn. 5. It appears that the supplemental earnings provision under La. R.S. § 1221 is the equivalent of Utah's temporary partial disability provision. Louisiana's permanent total disability compensation reverse offsets enumerated in § 1225 are similar to those at issue herein.

In Boan v. Richardson, 198 W.Va. 545 (1996), the West Virginia Supreme Court of Appeals agreed that the state purposes of preserving the fiscal integrity of the state workers' compensation system and avoiding duplication of benefits were legitimate governmental concerns. However, the Court stated that the benefits available under the workers' compensation act were "in lieu of such elements of damage in the common law tort system as lost wages, lost earning capacity, reimbursement of past and future medical expenses, past and present pain and suffering, emotional distress, and other factors." Id. at 548. The Court reasoned that social security retirement benefits, on the other hand, are retirement benefits earned by continuation in the work force and the attainment of the age of 62 or 65. The Court concluded that because totally disabled workers' compensation claimants over 65 were treated differently from partially disabled

workers over 65, the statute treated similarly situated individuals differently. Id. at 553. Finally, the Court concluded that the classification of "old age social security recipient" was not rationally related to the governmental purpose of avoiding duplication of benefits and concluded that "as a result, all persons within the class of 'old age social security recipients' were not treated equally."

Importantly, the Boan Court concluded that workers' compensation benefits were intended to replace *in full* the many elements of damages that are available to tort plaintiffs from tort feasors. Utah courts have never held that the statutory benefits available under workers' compensation are intended to substitute for all of the damages potentially available to a plaintiff in a tort lawsuit. See Park Utah Consol. Mines and Broderick, supra.

Rather, workers' compensation benefits are a statutory creation that are not based on fault. Professor Larson states the level of benefits is "based on a compromise between actual loss of earning capacity and arbitrary presumptions of the amount needed for support." Larson, §1.04[3]. The Boan Court failed to appreciate the distinction between damages available in tort and compensation available through workers' compensation programs. "A compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he or she has lost; it gives claimant a sum which, added to his or her remaining earning capacity, if any, will presumably enable claimant to exist without being a burden to others." Larson, §1.03[5].

Workers compensation benefits are not intended to represent and cannot reasonably be construed as a substitution for damages for pain, suffering and emotional distress, because those damages are simply unavailable in a typical workers' compensation system. "In compensation, unlike tort, the only injuries compensated for are those which either actually or presumptively produce disability and thereby presumably affect earning power. For this reason, some classes of injuries which result in verdicts of thousands of dollars at common law produce no award whatsoever under a compensation statute." Larson, §1.03[4].

Although Utah's statute restricts Mr, Merrill's right to sue his employer in tort, tort law would require him to prove employer negligence and fault before he would be entitled to any compensation for his loss. An example of the limitations inherent in using tort law to provide for injured workers, is the case of a railroad worker who injured his hand while coupling cars in employment outside our workers' compensation system. Benefits under tort were denied because the railroad cars were not defective, and Mr. Raymond knew it was extremely dangerous to put his hand in a position where a slight forward shifting of the load could and did injure his hand. Raymond v. Union Pacific Railroad Co., 191 P.2d 137 (Utah 1948).

The workers' compensation system was created to remedy a situation where injured workers were not able to receive any compensation for their injuries in the workplace because they could not prove the necessary elements

under the common law. Employers faced the uncertain financial impact of defending negligence suits filed by injured workers or their dependents. The legislature recognized that proving negligence and collecting damages is not a sure thing, and that the expense and uncertainty of the tort system placed burdens on business and the local economy as well as injured workers. To remedy these perceived problems, the legislature adopted a no-fault, statutory system of benefits to serve employers and employees. However, the statutory scheme provides only limited benefits in exchange for no fault coverage. For all of these reasons, the analysis offered by the Boan Court is not applicable to the constitutional analysis of Utah's reverse offset statute.

It is interesting to note that the West Virginia Legislature responded to the Boan decision by amending the workers' compensation statute to terminate all permanent total disability benefits at age 65[3]. The West Virginia Supreme Court of Appeals reviewed the constitutionality of the new statutory provision in State ex rel. Beirne v. Smith, 214 W.Va. 771 (2003). The West Virginia Court upheld the constitutionality of the amended statute, observing that, despite its remedial nature and purpose, the benefits available under the state workers' compensation system are defined and limited by the statute. The Court noted it was the role of the Legislature to balance the compensation available to injured workers against

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[3] W.Va. Code § 23-4-6(d) (1995).

the need to maintain the fiscal integrity of the workers' compensation insurance providers.

The Colorado Supreme Court held that state's statute denying permanent total disability but allowing permanent partial disability compensation benefits to injured workers over 65 unconstitutional because the statute treated permanent and totally disabled injured workers over 65 differently from partially disabled workers over age 65. The reasons given for those statutory limitations were to prevent duplication of wage replacement benefits, allow a cost of living increase for other workers' compensation recipients, and reduce costs. Industrial Claims Appeals Office v. Romero, 912 P.2d 62 (CO 1996). Again, the Colorado benefit scheme that was held unconstitutional is different from Utah's reverse offset provision.

The Wyoming decision cited by Mr. Merrill, Reesor v. Montana State Fund, 2004 MT 370 (MT 2004) (No rational basis to deny permanent partial disability compensation to a class of injured workers based on their age), similarly addresses statutory provisions related to permanent partial disability benefits, dissimilar to the provisions of the Utah statute at issue herein.

Petitioner cites Sasso v. Ram Property Management, 431 So.2d 204 (FL 1st DCA 1983); affd Sasso v. Ram Property Management, 452 So.2d 932 (FL 1984), to support his claim that avoiding duplication of benefits by is not rationally related to the purpose of the workers' compensation statute. Id. at 218. However,

the Florida Court ultimately concluded that reducing employer payments of employment related fringe benefits; attempting to offer increased job opportunities to younger workers; creating incentives for older workers to retire by providing decreased disability coverage; and reducing the costs of premiums were all rationally related to the purposes of the workers' compensation statute. The Court ultimately concluded that the Florida provision in question did not offend the equal protection clause.

Utah's reverse offset provision, taken as part of the entire scheme of workers' compensation benefits provided under the statute, attempts to balance the interests of workers, business and the general public. The statute provides limited benefits to compensate an injured worker for medical expenses and wage loss, including any permanent impairment of earning capacity, that results from an industrial injury. These basic benefits are available upon a showing that the injury arose out of and in the course of employment and was medically and legally caused or aggravated by the employment.

The Utah statute attempts to balance the need to pay continuing wage replacement benefits to older injured workers' who are considered to be retired, with the need to control the cost of workers' compensation benefits and premiums. Utah workers are not subject to a harsh offset that eliminates benefits entirely upon reaching "retirement age," as in some jurisdictions. The employer does not pay for duplicate disability and retirement wage replacement benefits

once the injured worker reaches the age that he is considered retired from the workforce. Rather, the Utah Legislature chose to coordinate the workers' compensation benefit with the social security retirement benefit. The injured worker continues to receive social security retirement benefits pursuant to federal law, but the employer is entitled to reduce the workers compensation benefits paid, arguably in exchange for the social security taxes paid by the injured worker's employers. Thus, Utah's reverse offset avoids duplication of benefits for a single wage loss.

It was rational for the Utah Legislature to conclude that receipt of Social Security Retirement benefits establishes a presumption that the injured worker is retired from the workforce. It is was also rational for the legislature to reduce wage replacement benefits available to PTD recipients on the date he is considered under the Act to be retired from the workforce to help control costs and avoid duplication of benefits.

The coordination of benefits or reverse offset contained in §413(5) helps to provide a fiscally sound system and helps to control the cost of workers' compensation premiums. The general public benefits from a competitive economy that attracts new employers to the state and avoids creating a

competitive disadvantage for Utah employers in relation to employers located in other states[4].

Mr. Merrill argues that although social security will allow him to earn unlimited wages and receive undiminished social security retirement benefits, he can no longer work to earn additional wages because of his disability. However, Mr. Merrill's receipt of permanent total disability compensation does not mean that he can no longer work at all. §34A-2-413(7) allows permanent total disability recipients to work to supplement their income up to $500 per month, if he is physically capable and chooses to do so. In addition, an award of permanent total disability compensation, in and of itself, does not mean an injured worker cannot work at *any* job. Rather, an award of permanent total disability reflects that the employee cannot perform the particular job or class of jobs that he was capable of performing on the date of the accident, and earn a similar wage. It is not uncommon for an injured worker to qualify for permanent total disability compensation because available employment options available to him after the accident pay a lower wage than his wage on the date of injury. See LPI Services v. Labor Commission, 2007 UT App 375 (Commission rule that establishes

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[4] "Observe that this question of the theoretical impact of compensation liability on the individual employer is an entirely different matter from the question of whether the relative generosity of compensation in a particular jurisdiction subjects the industry of an entire state to a competitive disadvantage. For example, when Wisconsin began to compensate for silicosis before its neighbors did, its granite and monument works had to shut down. . ." Larson, § 1.03 fn. 19.

specific wage thresholds to determine whether "other work reasonably available," is not an abuse of agency discretion.)

Utah's statutory workers' compensation scheme reduces uncertainty, simplifies administration of claims, and controls the cost of the system. This benefits employers and employees. Employees and employers benefit from the ability to predict and calculate benefits based on the statutory formulae. The statutory limits on available benefits, regulation of medical expenses, and ability to predict benefits with some certainty keeps the cost of insurance premiums low, which encourages job growth and business relocation into our state. Employees benefit from the liberal construction of the statutory provisions which bring as many workers as possible under the umbrella of the workers' compensation system, but the trade off for such generous coverage is limited benefits. The legislature made a number of policy choices to define a basic set of benefits to prevent impoverishment of employees who are injured on the job. Although the costs of the system are spread among the consumers of products and services, there is not an infinite amount of money available to finance this system. Although the balance reached by the legislature may not be perfect for specific employees and employers in a given situation, overall, it functions as designed.

It is the role of the legislature to balance the interests of the affected parties and make the policy decisions regarding the extent of coverage available under our workers' compensation system. In regard to §413(5), the legislature most

likely concluded that injured workers' who receive social security retirement benefits have another source of wage replacement income and adopted the reverse offset to avoid duplication of benefits paid by the employer that are intended to cover the same wage loss. Professor Larson notes:

> Wage loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage-loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a workman undergoes a period of wage loss due to all three conditions, it does not follow that he or she should receive three sets of benefits simultaneously and thereby recover more than his or her actual wage. The worker is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit.

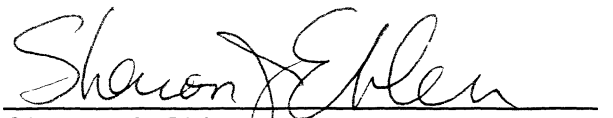
Larson, §157.01 (2007).

CONCLUSION

For the above reasons, the limitation of benefits under §413(5) helps to control costs and avoid duplication of wage loss payments for a single wage loss. It helps to preserve a system of benefits for injured workers which are limited, but relatively easy to obtain. Accordingly, §413(5) is rationally related to these legitimate purposes and is constitutional. This Court should affirm the decision of the Court of Appeals in this matter.

Respectfully submitted this 19 day of February 2008.

BLACKBURN & STOLL, LC



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CERTIFICATE OF SERVICE

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